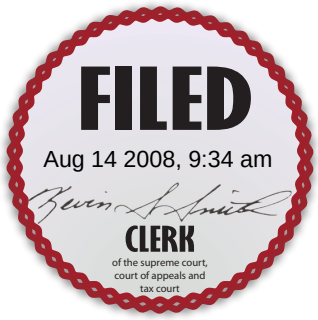

ATTORNEY FOR APPELLANT:

BEAU J. WHITE
Marion, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

MONIKA PREKOPA TALBOT
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

DWIGHT VANDIVER, SR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 27A02-0712-CR-1123
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable Jeffrey D. Todd, Judge
Cause No. 27D01-0512-FB-205

August 14, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Dwight Vandiver, Sr., appeals from his convictions, following a jury trial, of the following crimes: count I, class B felony sexual misconduct with a minor; count II, class C felony child molesting; count III, class C felony sexual misconduct with a minor; count IV, class C felony sexual misconduct with a minor; count V, class C felony child molesting; and count VI, class D felony sexual battery.

ISSUES

1. Whether the trial court properly instructed the jury with regard to the use of polygraph examination evidence.

2. Whether the Agreement of Stipulation of Polygraph Examination was a valid contract and admissible into evidence.

3. Whether the State presented sufficient evidence to support Vandiver's conviction for sexual battery.

4. Whether the trial court committed fundamental error when it admitted evidence of Vandiver's prior bad acts of physical abuse of his children.

FACTS

Vandiver, born on April 15, 1953, married Brenda in 1998. Their household consisted of Vandiver's three children from a prior marriage, including his son, C.V.; Brenda's two children from a prior marriage, Ka.C.[1] and Ki.C.[2]; and two children produced of their marriage. In 2002, Ka.C. told her cousin that Vandiver had touched her breasts and vagina. Ka.C.'s cousin told her mother, Brenda's sister, what Ka.C. had

[1] Ka.C. was born on September 24, 1990.

[2] Ki.C. was born on April 22, 1993.

alleged, and the sister disclosed the allegations to Brenda. Neither, however, reported the allegations to the police or to Child Protective Services.

In November of 2005, Ka.C. again complained to her cousin that Vandiver was still touching her. Again, Ka.C.'s cousin, told her mother, Brenda's sister, about the allegations. This time, the aunt reported the allegations to the family pastor, who, in turn, notified Child Protective Services.

The police and Child Protective Services launched an investigation into Ka.C.'s allegations. Subsequently, all of the children were removed from the Vandiver residence.[3] Therefore, on December 5, 2005, Vandiver executed a Polygraph Statement of Consent and an Adult Waiver of Rights and Polygraph Waiver. He also signed an Agreement of Stipulation of Polygraph Examination and submitted to the examination. The test results indicated that Vandiver had given deceptive responses when asked whether he had touched Ka.C.'s breasts and vagina for sexual gratification.

On December 7, 2005, the State charged Vandiver with the following offenses against Ka.C.: count I, class B felony sexual misconduct with a minor;[4] count II, class C felony child molesting;[5] count III, class C felony sexual misconduct with a minor;[6] and

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[3] Ka.C. and Ki.C. were placed in the custody of their biological father, and the remaining children were placed into foster care.

[4] Indiana Code section 35-42-4-9(a)(1).

[5] I.C. § 35-42-4-3(b).

[6] I.C. § 35-42-4-9(b)(1).

count IV, class C felony sexual misconduct with a minor.[7] On March 3, 2006, the State amended the information and charged Vandiver with the following additional offenses against Ki.C.: Count V, class C felony child molesting;[8] count VI, class D felony sexual battery;[9] and count VII, class A misdemeanor battery resulting in bodily injury.[10] Vandiver filed a motion in limine regarding the admissibility of the results of the polygraph examination.[11] The trial court took the motion under advisement. On April 19, 2006, the State arrested Brenda and charged her with class D felony child neglect; Brenda pled guilty soon thereafter.

Vandiver's jury trial was conducted from July 16-19, 2006. Ka.C. was among the first of the State's witnesses to testify, and she recounted numerous episodes of fondling and molestation by Vandiver. According to her testimony, the first incident occurred when she was in the fourth grade after the family purchased a new computer. She testified that in order for her to use it, she would "have to sit on [Vandiver's] lap and he would sit there and feel [her] body parts, meaning [her] vagina." (Tr. 299). She testified that she never reported this incident because she "didn't think anybody would believe [her] and at that time [she] didn't really think it was bad because [she] thought he was tickling [her]." (Tr. 300).

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[7] I.C. § 35-42-4-9(b)(1).

[8] I.C. § 35-42-4-3(b).

[9] I.C. § 35-42-4-8(a)(2).

[10] I.C. § 35-42-2-1(a)(1)(A).

[11] It is unclear from the record when exactly Vandiver filed his motion in limine.

Ka.C. testified that matters "got worse" when she was in fifth grade because, almost nightly, Vandiver would line the children up for "hugs, kisses and tickle time" before they went to bed and would grab the girls' breasts. (Tr. 318). Ka.C. testified that Vandiver's hugs and kisses continued until she "complained and refused to give 'em." (Tr. 301). As a result, Vandiver "told [Ka.C.] not to call him . . . dad anymore." (Tr. 302).

Ka.C. testified to another incident which occurred when she was approximately eleven or twelve years-old. She testified that Vandiver followed her into the bathroom, "told [her] to pull [her] shirt up and was playing with [her] breasts." (Tr. 303). She testified that during the incident, Vandiver told her, "Millions of girls pay to have what you have." (Tr. 303-04).

Ka.C. testified further that when she was in the eighth grade, and approximately fourteen or fifteen years of age, Vandiver insisted that she no longer sleep in the bedroom that she shared with her sisters and was given her own bedroom. She testified that the decision to separate her was "sort of a punishment" because Vandiver claimed that she "needed to be split from the [other] girls because [she] was putting things in their brain[s]." (Tr. 298). She testified that she was "scared to stay in there by [her]self" because she feared that Vandiver "would come in and mess with her." (Tr. 299).

Ka.C. testified that on another occasion, Vandiver fondled and molested her while she spoke on the telephone with her boyfriend. She testified that Vandiver touched her breasts under her shirt; "made [her] touch him"; and "stuck his fingers inside [her

vagina]." (Tr. 306, 309). She testified that during the incident, she felt pain, was "disgusted" and "sick to [her] stomach." (Tr. 309).

Additionally, Ka.C. testified that on one occasion when she was cooking, Vandiver "st[u]ck his hands down the front of [her] pants . . . ." (Tr. 309). She testified to another occasion that, after returning from swimming with her sister and cousin, Vandiver had told her that she had stretch marks and fondled her breasts and, "[M]y cousin . . . was there and so was my sister . . . and he told 'em to leave the room." (Tr. 311).

Ka.C. testified about an incident which occurred close to the family's Thanksgiving dinner, when Vandiver told her to meet him in the bedroom. She testified that she refused "because [she] was tired of the way he touched [her] when [she] was in there," and Vandiver responded that "all he was doing was preparing [her] for a mature relationship." (Tr. 311).

Ka.C. testified that Vandiver frequently manipulated her into submitting to his fondling. She recalled that, on "more than ten (10)" occasions, Vandiver had asked her to "let him touch [her] breasts and vagina" in exchange for reducing the durations of her groundings or to allow her to spend the night with friends. (Tr. 325).

Ka.C. further testified that on several occasions, she reported Vandiver's conduct to her mother, Brenda, but to no avail. Brenda would "either say that [Ka.C.] was lying or [would tell her] just to stay out of the same room as he is and don't ever go in a room by yourself with him." (Tr. 315). On these occasions, Vandiver, too, dismissed Ka.C. as a liar and told Brenda that Ka.C. "wanted to split the family up." (Tr. 301). She testified

that Vandiver also resorted to threats as a means of keeping her quiet. She testified that he told her that if she reported him, "he would turn [her] in for incorrigibility or that [her] whole family would be split apart." (Tr. 314). He also warned Ka.C. that Brenda "wouldn't get the three (3) [children] that were his and that [Brenda would] have to fight like heck to get [Ka.C.'s] two (2) little brothers, and [Ka.C.'s] little brother and little sister back." (Tr. 314). She testified that she believed Vandiver because he was the disciplinarian of the household, and Brenda frequently "would just follow through with whatever [Vandiver] had to say." (Tr. 325).

Ka.C. testified that despite an opportunity to report Vandiver to her boyfriend or to the family's counselor, she maintained her silence for fear that he would hurt her boyfriend or break up the family.

Ka.C.'s sister, Ki.C., testified that Vandiver had also touched her improperly during hugs, tickles, and kisses time. She testified that she began to feel uncomfortable with the nightly routine when he "started touching [her] in places he shouldn't be touching." (Tr. 375). She testified that he had touched her breasts and vagina with his hands and that the touching made her uncomfortable. She also testified that for a time, the hugs, kisses and tickles stopped because the children complained. The nightly ritual resumed because they "started feeling bad," and Vandiver "seemed more angry," and Vandiver "would sometimes give [Brenda] a guilt trip" about the children not acting like they loved him. (Tr. 377).

Ki.C. testified that on one occasion during hugs, kisses and tickles, she kissed and hugged Vandiver goodnight, but afterwards, feeling uncomfortable, she "turned around

and start[ed] pulling [herself] the other way." (Tr. 387). She testified that Vandiver then pulled her back towards him and bit her buttock, bruising her skin.

Ki.C. also testified that when she was approximately eleven years-old, Vandiver molested her after she had accompanied him to a doctor's appointment. (Tr. 380). She testified that, after the appointment, he drove "out in the country," pulled over, "told [her] to unzip her pants," and began touching her vagina underneath her clothing. (Tr. 380). She testified that she felt "[v]ery, very uncomfortable," "started pushing his hand away," and "was upset and . . . crying" and he stopped. (Tr. 382, 383). She did not report the incident to anyone because she "was scared" and because he "had said that he would run away with the other kids and leave [Ki.C., Ka.C. and Brenda behind]." (Tr. 383).

C.V. testified that his father was physically abusive to him. C.V. recounted an incident during which Vandiver had struck him, bloodied his nose and made him bleed from his mouth. He testified further that although Ka.C. had told him of Vandiver's molestations, he did not confront him because he was scared of what he would do to him.

The jury also heard Brenda's testimony that she had not acted to protect Ka.C. or to confront Vandiver about Ka.C.'s allegations of sexual abuse because she "didn't want to believe it was happening." (Tr. 410). She testified that she also feared losing custody of her children with Vandiver as well as losing contact with her step-children from his prior marriage. Brenda explained her reluctance to confront Vandiver as follows: "You don't confront [Vandiver] in front to the kids . . . because that shows disrespect. You're . . . questioning his authority." (Tr. 430). Lastly, Brenda testified that she had recently pled guilty to class D felony child neglect.

On July 18, 2007, outside the presence of the jury, the trial court conducted a hearing on Vandiver's motion in limine regarding the results of the polygraph examination. Defense counsel argued that the stipulated results of the polygraph examination should not be admitted into evidence because Vandiver had not made a knowing waiver of his rights. The State responded that (1) Vandiver's stipulation was adequate under Indiana law; (2) he had been clearly advised that the polygraph examination and results were inadmissible without his waiver and agreement; and (3) he had waived his right, thereby making the polygraph evidence admissible. The trial court found no ambiguity in the stipulated agreement and concluded that Vandiver was bound by its terms. Thus, evidence of the results of the polygraph examination were deemed admissible.

During the defense's case-in-chief, Vandiver denied that he touched Ka.C. or Ki.C. inappropriately. He also testified that hugs, kisses and tickle time was "just to put the children in a good mood," adding that "the research shows that a child rests better if they [sic] go to bed in a good mood other than angry or sad. So I always tried to get 'em in a good mood." (Tr. 550).

At the close of the evidence, the jury found Vandiver guilty on all seven counts. At his sentencing hearing on August 13, 2007, Vandiver moved the dismissal of count VII and that it be vacated, arguing that the sexual battery conviction was based upon the same evidence that was used to convict him of sexual battery in count VI. The trial court granted Vandiver's motion and imposed sentencing as follows: count I, ten years; counts II through V, four years on each count; and count VI, a one and one-half year sentence

suspended to probation. Sentences on counts I through VI were ordered served consecutively, for an aggregate sentence of 27½ years, with 26 years executed in the Department of Correction. Vandiver now appeals.

DECISION

Vandiver raises several issues for reversal of his conviction. He argues that the trial court failed to properly instruct the jury regarding the admissibility of the results of the polygraph examination. He argues further that the Stipulation of Polygraph Examination in this case is not a valid contract because he was not properly advised that by signing the stipulation, he was authorizing the admission of the polygraph examination evidence that would otherwise be inadmissible. Next, he contends that the State failed to present sufficient evidence to support his conviction for sexual battery of Ki.C. Lastly, he argues that by improperly admitting evidence of his prior bad acts, the trial court committed fundamental error.

1. Jury Instruction

Vandiver argues that the trial court committed reversible error because it failed to properly instruct the jury regarding the use of the result of the polygraph examiner's testimony. Specifically, he argues that the trial court should have instructed the jurors that the polygraph examiner's testimony does not tend to prove or disprove any element of the charged crime, but at most tends only to indicate whether at the time of the examination, the defendant was being truthful. This argument is waived.

Indiana Appellate Rule 46(A)(8)(e) provides that where an appellant asserts reversible error that is "predicated on the giving or refusing of any instruction, the

instruction shall be set out verbatim in the argument section of the [appellant's] brief with the verbatim objections, if any, made thereto." Vandiver has not included his tendered instruction in his brief or directed us to the location where the same may be found.[12] Nor does his Appendix contain the proposed instruction. *See Wilkinson v. Swafford,* 811 N.E.2d 374, 380 n.5 (Ind. Ct. App. 2004) (allowing review of an instruction when it is included in the appellant's Appendix), *overruled on other grounds by Willis v. Westerfield*, 839 N.E.2d 1179 (Ind. 2006).

Moreover, at trial, Vandiver objected to the trial court's instruction because it did not address the unreliability of polygraph examinations; however, he now contends that the instruction was improper because it did not specifically state that the polygraph examiner's testimony does not prove or disprove any element of the charged offense. On the other hand, "It is well-settled law in Indiana that a defendant may not argue one ground for objection at trial and then raise new grounds on appeal." *Gill v. State,* 730 N.E.2d 709, 711 (Ind. 2000). Vandiver has not preserved this new argument for appeal. Waiver notwithstanding, we address Vandiver's argument on its merits.

The manner of instructing a jury is left within the sound discretion of the trial court, and we review its decision thereon only for an abuse of discretion. *Stringer v. State,* 853 N.E.2d 543, 548 (Ind. Ct. App. 2006). When the trial court refuses to give a

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[12] The requirements under Trial Rule 46(A)(8)(e) are more than mere formality. They play an important role in assuring that this Court has a complete and accurate record of what transpired before the trial court. 'In the context of jury instruction issues, the requirements ensure that the Court has a record of what the jury was actually instructed so that it may make informed decisions as to the propriety and the consequences of the giving or the refusing of any instructions.' *Reed v. State,* 702 N.E.2d 685, 690 (Ind. 1998) (analyzing the predecessor to Ind. Appellate Rule 46) (internal citations omitted).

tendered instruction, we consider (1) whether the instruction correctly states the law; (2) whether the record supports the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other instructions that are given. *Id*. "Error in a particular instruction will not result in reversal unless the entire jury charge misleads the jury as to the law in the case." *Id*. "Before a defendant is entitled to a reversal, he must affirmatively show that the instructional error prejudiced his substantial rights." *Id*. Vandiver has not met this burden.

Specifically, Vandiver's challenge to the trial court's instruction appears to contest whether it constitutes a correct statement of the law, because it does not expressly state that polygraph examinations are "considered inherently unreliable." (Tr. 586).

The record reveals that the jury was instructed as follows:

> You are instructed that at most a polygraph examiner's testimony tends only to show whether the person being examined as [sic] being truthful at the time of the examination. It is for the jury to determine the weight and affect [sic] to be given to the polygraph examiner's testimony.

(Tr. 600). Although Vandiver has failed to provide us with a copy of the text of his tendered instruction, we can glean the essence of his tendered instruction from the following colloquy in the transcript:

> Defense counsel: . . . . Bottom line, Judge, I think without that first paragraph [of my tendered instruction] the jury is not gonna know that the law in the State of Indiana is [that polygraphs] are considered scientifically unreliable and absent a stipulation cannot be admitted into evidence. I can live without the 'knowing that absent the stipulation,' it's not gonna be admitted into evidence [language], but what I can't live with and what I think I'm entitled to is them knowing that these things are considered inherently unreliable.

> Court: Alright. Thank you. It's the Court's decision in this case to give the Court's instruction and not the defendant's proposed instruction. I base that upon the Will[e]y case and the Sanchez case which sets forth the four pre-requisites to the admission of polygraph results. Item number 4 regarding the jury instruction that must be given as a pre-requisite, the Court's instruction tracks that to the T and therefore I think it accurately states the law in the State of Indiana, specifically as to what the jury must be told when we do have a stipulated polygraph, so the Court's instruction will be given.

(Tr. 586-87).

As the trial court noted in the preceding colloquy, our Supreme Court has identified four prerequisites to the admission of polygraph results,[13] including, most relevantly, the fourth, which requires that "the jury be instructed that, at most, the examiner's testimony tends only to show whether the defendant was being truthful at the time of the examination, and that it is for the jury to determine the weight and effect to be given to the examiner's testimony." *Willey v. State*, 712 N.E.2d 434, 439 (Ind. 1999) (citing *Sanchez v. State*, 675 N.E.2d 306, 308 (Ind. 1996)) (emphasis added).

Although the trial court's instruction herein and the *Willey* instruction are virtually indistinguishable, Vandiver contends that the former was erroneous because it failed to state the entire fourth prerequisite verbatim from *Owens v. State*, 373 N.E.2d 913, 915 (1978), wherein, our Supreme Court set forth the fourth prerequisite as follows:

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[13] There are four prerequisites to the admission of polygraph results: (1) that the prosecution, defendant, and defense counsel must all sign a written stipulation providing for the defendant's submission to the examination and for the subsequent admission at trial of the results; (2) that notwithstanding that stipulation, the admissibility of the test results is at the trial court's discretion regarding the examiner's qualifications and the test conditions; (3) that the opposing party shall have the right to cross-examine the examiner if his or her graphs and opinions are offered into evidence; (4) that the jury be instructed that, at most, the examiner's testimony tends only to show whether the defendant was being truthful at the time of the examination, and that it is for the jury to determine the weight and effect to be given to the examiner's testimony. *Willey v. State*, 712 N.E.2d 434, 439 (Ind. 1999) (citing *Sanchez v. State*, 675 N.E.2d 306, 308 (Ind. 1996)).

> [I]f [evidence of a polygraph exam] is admitted the trial judge should instruct the jury that the examiner's testimony does not tend to prove or disprove any element of the crime with which a defendant is charged but at most tends only to indicate that at the time of the examination defendant [was or] was not telling the truth. Further, the jury members should be instructed that it is for them to determine what corroborative weight and effect such testimony should be given.

Sanchez, 675 N.E.2d at 308 (citing *Hare v. State*, 467 N.E.2d 7, 16 (Ind. 1984); *Owens*, 373 N.E.2d at 915; *Arizona v. Valdez*, 371 P.2d 894 (1962)) (emphasis added). The omitted language, Vandiver argues,

> is crucial in making clear to the jury that the evidence does not prove or disprove any element of a crime and without this language, the jury, although being instructed that it can determine the weight and affect [sic] of the evidence, might still believe that such evidence does in fact prove any or all of the [elements] of a crime.

Vandiver's Br. at 13. We disagree.

By instructing the jury that the polygraph examiner's testimony "at most" tended "only" to indicate whether Vandiver was being truthful at the time of the examination, the trial court highlighted for the jury the limited scope and application of the result of the polygraph examination evidence. (Tr. 600). In addition, the record reveals that in other instructions, the trial court instructed the jury as to the various statutory elements that the State was required to prove beyond a reasonable doubt, thereby communicating that the State still bore the independent burden of proving the necessary material elements of each of the various offenses with which Vandiver was charged. The trial court's instruction constituted a correct statement of the law regarding the admissibility of the results of the polygraph examination and properly instructed the jury as to the extent to which the polygraph examiner's testimony was deemed reliable.

Based upon the foregoing, we do not find that the trial court's instruction incorrectly stated the law and gave the jury an inflated sense of the reliability of polygraph examination results. The trial court properly instructed the jury in accordance with Indiana's Supreme Court precedent, and we find no abuse of discretion.

2. Validity of Stipulation of Polygraph Examination Contract

Vandiver argues that the stipulation herein was not a valid and enforceable contract because the State did not specify therein the alleged victims' names and the specific time frames within which the alleged incidents of molestation or sexual misconduct were supposed to have occurred. Thus, he argues, "there was . . . no meeting of the minds as to the subject of the polygraph examination." Vandiver's Br. at 15. He argues further that because the stipulation does not contain language stating that the polygraph examiner's testimony is generally inadmissible in Indiana; and, that he was not clearly advised that by signing the stipulation, he was agreeing to allow otherwise inadmissible polygraph examination results into evidence. We reject both contentions.

We begin by addressing Vandiver's contention that the stipulation was not valid and enforceable because the State did not specify therein the alleged victims' names and the specific time frames in which the alleged incidents of molestation or sexual misconduct occurred.

The Agreement of Stipulation of Polygraph Examination, signed by both Vandiver and the prosecutor on December 5, 2005, provided, in pertinent part, the following:

> It is hereby agreed and stipulated between one DWIGHT VANDIVER SR without the presence of an attorney, and the State of Indiana, through the Fairmount Police Department that said suspect

> voluntarily agrees and has requested permission to take a polygraph (truth verification/lie detector) examination to be given by Reggie Nevels, Polygraph Examiner.
>
> The purpose of this examination is to assist in determining whether or not the suspect is involved in the crime of CHILD MOLESTING/SEXUAL MISCONDUCT WITH A MINOR.
>
> That this agreement and stipulation and the polygraph examination is being taken upon the request of the said Defendant DWIGHT VANDIVER SR. and also upon the request of the STATE OF INDIANA.
>
> It is further agreed and understood that DWIGHT VANDIVER SR. has on more than one (1) occasion been advised of his/her right to counsel and that he/she is hereby and was prior to the signing of this agreement, advised of his/her rights to counsel and the fact that polygraph examination may not be entered into evidence against him/her in the event that charges are filed against him/her. That being so advised and so cognizant of the law of evidence pertaining to polygraph examinations, the said DWIGHT VANDIVER SR. does, pursuant to the terms of this agreement, waive and relinquish that right and does hereby agree that the results of said examination may be used in any cause of action which should arise against him/her as a result of any charges filed against him/her arising out of the incident herein above described.

(State's Ex. 3).

As the State notes, the stipulation expressly identifies the purpose of the polygraph examination as "determining whether or not [Vandiver] is involved in the crime of CHILD MOLESTING/SEXUAL MISCONDUCT WITH A MINOR." (State's Ex. 3). Before Vandiver submitted to the stipulated polygraph examination on December 5, 2005, he was fully aware that he was being investigated for the alleged sexual molestation and sexual misconduct of his minor step-daughters, Ka.C. and Ki.C. On December 2, 2005, during a videotaped police interview, Vandiver was questioned at length regarding claims by both Ka.C. and Ki.C. that he had touched them

inappropriately. After being advised of the consequences of taking a polygraph examination, he executed a written Polygraph Statement of Consent, an Adult Waiver of Rights and Polygraph Waiver, and stipulation before submitting to the polygraph examination.

In light of these facts, it is difficult for us to find support for Vandiver's claim that he was unaware of the subject matter of the polygraph examination; more specifically the identities of his accusers or the time frames in which the alleged incidents occurred. We decline to address this issue further.

Next, we direct our attention to Vandiver's contention that he was not clearly advised that by signing the stipulated agreement, he was, in effect, agreeing to allow otherwise inadmissible polygraph examination results into evidence. We are unpersuaded.

As noted previously, there are four prerequisites to the admission of polygraph examination results. Most relevant for our purposes herein is the first prerequisite contained in the document which requires that "the prosecution, defendant, and defense counsel must all sign a written stipulation providing for the defendant's submission to the examination and for the subsequent admission at trial of the results." *Willey,* 712 N.E.2d at 439 (citing *Sanchez,* 675 N.E.2d at 308). The written stipulation becomes a binding contract between the State and the defendant. *Willey,* 712 N.E.2d at 440 (citing *Atkinson v. State,* 581 N.E.2d 1247, 1250 (Ind. 1991)). "Contract law principles therefore control its use and interpretation. *Willey,* 712 N.E.2d at 440.

When interpreting a contract, our goal is to ascertain and enforce the intent of the parties, and clear and unambiguous language will be given its plain and ordinary meaning. *Bush v. State Farm Mut. Auto. Ins. Co.*, 882 N.E.2d 821, 826 (Ind. Ct. App. 2008), *reh'g denied*. When the terms of a contract are clear and unambiguous, they are conclusive of that intent, and the court will not construe the contract or look to extrinsic evidence; rather, we will merely apply the contractual provisions. *Griffin v. State*, 756 N.E.2d 572, 574 (Ind. Ct. App. 2001), *trans. denied*. "A contract is ambiguous only if it is 'susceptible to more than one interpretation and reasonably intelligent persons would differ as to its meaning.'" *Willey*, 712 N.E.2d at 440.

In the final paragraph, an excerpted portion of the written document provides that before signing, Vandiver had been advised of his rights and that in the event that the State pressed charges, it may not be permitted to introduce the result of the polygraph examination into evidence against him. ("polygraph evidence may not be entered into evidence against [Vandiver] . . . in the event that charges are filed against him") (State's Ex. 3). However, and being "so advised and [being made] so cognizant of the law of evidence pertaining to polygraph examinations," Vandiver agreed to "waive and relinquish that right" and agreed, instead, to permit the State to introduce the results of the polygraph examination "in any cause of action which should arise against him . . . as a result of any charges filed against him . . . arising out of the incident herein above described." (State's Ex. 3).

The stipulation is clear and unambiguous on the question of the admissibility of the result of the polygraph examination, and we do not find that reasonable people could

differ as to the meaning of the challenged provisions. Accordingly, we reject Vandiver's argument that he was not clearly advised that by signing the stipulation, he was agreeing to allow otherwise inadmissible polygraph examination results into evidence.

3. Sufficiency of Evidence

Next, Vandiver argues that the evidence is insufficient to support his conviction for class D felony sexual battery of Ki.C. beyond a reasonable doubt.[14] Specifically, he challenges the sufficiency of the evidence regarding the element of *mens rea*, arguing that the State failed to prove that he acted with the intent to arouse or satisfy either his own sexual desires or Ki.C.'s sexual desires when he bit her buttock during the hugs, kisses and tickles time.

When we review a claim that a conviction is not supported by sufficient evidence, we generally may not reweigh the evidence or judge the credibility of witnesses. *Oldham v. State*, 779 N.E.2d 1162, 1168 (Ind. Ct. App. 2002), *trans. denied*. That is the function of the fact finder. *Id*. Instead, we look to the evidence most favorable to the conviction together with all reasonable inferences to be drawn therefrom. *Id*. We will affirm the conviction if evidence of probative value exists from which a fact-finder could find the defendant guilty beyond a reasonable doubt. *Bailey v. State*, 764 N.E.2d 728, 730 (Ind. Ct. App. 2002), *trans. denied*.

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[14] The State's charging information alleged that "on or about 2002 or 2003, in Grant County, State of Indiana, Dwight Vandiver Sr. did with intent to arouse or satisfy his own sexual desires touch another person, to-wit: [Ki.C.], when that person was compelled to submit to touching by force or the imminent threat of force . . . all of which is contrary to . . . I.C. 35-42-4-8(a)(2) . . . ." (Vandiver's App. 32-33).

To convict Vandiver of class D felony sexual battery, the State was required to prove beyond a reasonable doubt that he touched Ki.C. with the intent to arouse or satisfy his own sexual desires or Ki.C.'s sexual desires when Ki.C. was compelled to submit to the touching by force or the imminent threat of force. I.C. § 35-42-4-8.

We have previously held that "[a] person's intent may be determined from [his] conduct and the natural consequences thereof and intent may be inferred from circumstantial evidence." *J.J.M v. State*, 779 N.E.2d 602, 606 (Ind. Ct. App. 2002). The intent to gratify must correspond with the conduct because it is the purpose or motivation for the conduct. *Id*.

At trial, Ki.C. testified that during hugs, kisses, and tickles time, Vandiver routinely "touch[ed] [her] in places he shouldn't be touching." (Tr. 375). Ki.C. testified that Vandiver would touch her breasts and vagina with his hands – touching her nipples with his thumbs and her vagina with his fingers. She testified that Vandiver's touching "didn't feel right" and made her uncomfortable; and she did not think it was an accidental touching. (Tr. 376). Ki.C. testified further that on one particular occasion during hugs, kisses and tickles time, that after she kissed and hugged Vandiver goodnight, she felt uncomfortable and "turned around and start[ed] pulling [herself] the other way," when Vandiver then pulled her back towards him and bit her on her buttock. (Tr. 387).

Vandiver's intent to gratify may be inferred from his conduct and the natural consequences thereof. The jury heard testimony that during hugs, tickles and kisses time, Vandiver routinely and inappropriately touched Ki.C.'s breasts and vagina. On the occasion in question, Vandiver's touching made her feel uncomfortable and she

attempted to avoid further contact when he pulled her toward him and bit her buttock. The State contends that although "'the usual purpose of tickling is not to satisfy sexual desires, . . . in [Vandiver]'s case[,] tickling was clearly a way to perform inappropriate touching under the guise of appropriate touching." State's Br. at 17. We agree. The jury heard sufficient evidence from which it could reasonably infer from the overall context of what was occurring that Vandiver's act of pulling Ki.C. toward him and biting her buttock – an act committed during hugs, kisses, and tickles time – was done with the intent to arouse or satisfy his own sexual desires. Thus, we find sufficient evidence of probative value from which the jury could find Vandiver guilty of sexual battery beyond a reasonable doubt.

4. Fundamental Error

Lastly, Vandiver argues that the trial court's admission, over his objections, of Ka.C.'s and C.V.'s testimony that he physically abused his children constituted fundamental error. The State responds that the trial court properly admitted the evidence because it was being offered, not for an impermissible or forbidden purpose, but rather, to show Ka.C.'s state of mind when despite having opportunities, she failed to report Vandiver's inappropriate conduct.

In order to be deemed fundamental error, "an error must be so prejudicial to the rights of the defendant as to make a fair trial impossible." *Willey*, 712 N.E.2d at 445. *See also Wilson v. State*, 514 N.E.2d 282, 284 (Ind. 1987) (to rise to the level of fundamental error, the error must constitute a blatant violation of basic principles, the

harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process).

Indiana Evidence Rule 404(b) provides,

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .

The underlying rationale for Indiana Evidence Rule 404(b) is to preclude jurors from "making the 'forbidden inference' that the defendant had a criminal propensity and therefore engaged in the charged conduct." *Thompson v. State*, 690 N.E.2d 224, 233 (Ind. 1997). "The list of 'other purposes' in the Rule is not exhaustive; extrinsic act evidence may be admitted for any purpose not specified in Rule 404(b) unless precluded by the first sentence of Rule 404(b) or any other Rule." *Id.*

When a defendant objects to the admission of particular evidence on Rule 404(b) grounds, (1) the court must determine whether the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act; and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Evidence Rule 403." *Gillespie v. State*, 832 N.E.2d 1112, 1112 (Ind. Ct. App. 2005).

Without citation to authority, Vandiver first argues that the trial court's decision to allow the evidence was fundamental error because the victim's state of mind "is not a permitted exception to 404(b)." Vandiver's Br. at 21. This simple assertion, without cogent argument or citation to authority addressed to the specific claim of harm, is not

enough to prove fundamental error. *See Canaan v. State*, 683 N.E.2d 227, 232 (Ind. 1997); *see also* Indiana Appellate Rule 46(A)(8)(a), -(b) (providing that the appellant's contentions regarding the issues presented on appeal must be supported by cogent reasoning and by citations to authorities and statutes). Moreover, we disagree with Vandiver's contention and find that evidence of his physical abuse of his children was, indeed, relevant to show Ka.C.'s state of mind.

Under direct and cross-examination, Ka.C. testified that she did not report Vandiver's conduct despite having opportunities to tell others, including her boyfriend and the family's counselor.[15] On redirect, the State elicited testimony from Ka.C. which indicated that she had seen Vandiver lose his temper before and had been physically violent towards her and her siblings. When the State asked Ka.C. to discuss one such

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[15] Defense counsel questioned Ka.C. as follows about why she had not told her boyfriend that Vandiver was touching her:

> Q: . . . . The incident that you said occurred while you were on the phone with your boyfriend at that time. Who was your boyfriend at the time?
> A: Curtis Simpson.
>
> * * *
>
> Q: . . . . And you're saying that Dwight touched you while you were on the phone?
> A: Yes.
> Q: And you didn't say anything to, to Curtis?

(Tr. 333). Similarly, questioning Ka.C. about counseling sessions with Life Center counselor Daniel Sietz, defense counsel again elicited testimony from Ka.C. that she had not told Sietz or school officials about the alleged molestation.

> Q: Were you seeing Mr. Sietz during . . . the same period that [Vandiver] was touching [you?]
> A: Yes.
> Q: Did you ever tell Mr. Sietz about it during the one on one sessions?
> A: No.
> Q: Did you ever think about telling Mr. Sietz?
> A: Sometimes. I just didn't feel comfortable talking to a male about it.
> Q: Did you ever tell anyone at school about what happened?
> A: Not when it started.

(Tr. 341-342).

incident, defense counsel objected citing to Indiana Evidence Rule 404(b) grounds, and that he had not been given prior notice of the State's intention to admit such evidence. The State responded that defense counsel had opened the door to the issue of physical abuse during its cross-examination of Ka.C.; and, that the evidence was being offered, not to prove Vandiver's action in conformity thereof, but rather to show Ka.C.'s state of mind and to explain her reluctance to report Vandiver's conduct to outsiders. The trial court overruled the objection.

Ka.C. then testified that Vandiver was the disciplinarian in the family and that, on one occasion, she, her mom, and "[a]lmost all [her] brothers and sisters" saw Vandiver "pushing" and "hitting" C.V. – blackening C.V.'s eye, bloodying his nose, and causing him to bleed from his mouth. (Tr. 349). Ka.C. testified that Vandiver had also struck "[p]retty much everybody" with a belt, saying "[s]ometimes it would be on our butts, but other times [both she and Ki.C.] would get hit on the face with [the belt]." (Tr. 350).

Subsequently, C.V. testified that although Ka.C. told him that Vandiver had touched her inappropriately, he had done nothing because he "was scared" of what his father might do if he confronted him. (Tr. 358). Again, defense counsel objected on 404(b) grounds. The State responded that the evidence was being offered to demonstrate the extent to which the fear in the home, stemming from Vandiver's physical violence, had prevented Ka.C. from reporting Vandiver's alleged sexual abuse. The trial court overruled defense counsel's objection. C.V. went on to testify about the occasion when Vandiver had hit him – blackening his eye and bloodying his nose and mouth.

The State acknowledges in its brief that "[i]t is not clear whether the State provided prior notice of intent to use 404(b) evidence," but argues that even if Vandiver lacked notice, the trial court properly admitted the evidence because of good cause shown," – namely, that Vandiver's physical abuse was the reason why Ka.C. did not report his sexual abuse. State's Br. at 19. We agree.

The record reveals that Vandiver's physical abuse, coupled with his status as head of family and primary disciplinarian, might have fostered a climate of fear, intimidation and silence within the household. The State also presented evidence that Vandiver frequently grounded Ka.C., and would reduce the extent of her punishment by granting her special privileges when she "let him touch [her] breasts and [her] vagina." (Tr. 327). The State presented evidence that he labeled Ka.C. a trouble maker whose lies and allegations had poisoned the minds of her siblings, and who, as a result, deserved to be isolated from them and placed her in a separate bedroom, which, in effect, would make her even more vulnerable to his abuse. Based upon the foregoing facts, we find that the State successfully demonstrated that the evidence of Vandiver's prior physical abuse of the household was introduced for a relevant purpose other than to show his propensity to be violent and, therefore, did not violate Indiana Evidence Rule 404(b).

Even if such evidence is not excluded by Rule 404(b), it is still subject to Indiana Evidence Rule 403, and may be excluded if the danger of unfair prejudice substantially outweighs its probative value. *Dickens v. State*, 754 N.E.2d 1, 4 (Ind. 2001). "[E]vidence admitted in violation of [Rule 403] will not, [however,] require a conviction to be reversed 'if its probable impact on the jury, in light of all of the evidence in the

case, is sufficiently minor so as not to affect a party's substantial rights.'" *Houser v. State*, 823 N.E.2d 693, 698 (Ind. 2005) (quoting *Bassett v. State*, 795 N.E.2d 1050, 1054 (Ind. 2003)).

We need not reach the Rule 403 analysis here because we conclude that any error in the admission of the evidence did not affect Vandiver's substantial rights and therefore, constitutes harmless error. The testimony of Ka.C., Ki.C., and C.V. indicated that Vandiver's history of physical violence toward his family and his status as primary disciplinarian could combine to create a culture of fear, intimidation and silence in his household. In light of the foregoing, we hold that the admission of such evidence did not unduly prejudice him or affect his substantial rights.

Affirmed.

NAJAM, J., and BROWN, J., concur.